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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANN CHRZANOWSKI,

Plaintiff,

vs.

JUDGE GEORGE ASSAD, CITY OF
LAS VEGAS, a political subdivision of
the State of Nevada; MARSHAL R.
SAAVEDRA; JOHN DOES I-X, each
individually and in their official capacities,

Defendants.

CV-05-0418

CASE NO.: ~~CV-04-0318-RLH-PAL~~

**PLAINTIFF'S OPPOSITION TO
DEFENDANT CITY OF LAS
VEGAS' MOTION TO DISMISS**

COMES NOW, the Plaintiff, ANN CHRZANOWSKI, by and through her counsel, CAL
J. POTTER, III, ESQ., and hereby opposes Defendant CITY OF LAS VEGAS' Motion to
Dismiss.

This opposition is made and based upon the following memorandum of points and
authorities below, the pleadings and papers on file herein, the affidavit of Ann Chrzanowski and

17

1 any oral argument that the Court allows in this matter.

2 DATED this 26 day of September, 2005.

3 POTTER LAW OFFICES

4 By 
5 CAL J. POTTER, III, ESQ.

6 Nevada Bar No. 1988

7 JOHN C. FUNK, ESQ.

8 Nevada Bar No. 9255

9 1125 Shadow Lane

10 Las Vegas, Nevada 89102

11 Attorneys for Plaintiff

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I.**

14 **INTRODUCTION**

15 The Plaintiff has previously filed her opposition to City Marshal Raul Saavedra's motion
16 to dismiss. The City of Las Vegas is the employer of the Defendant Marshall and therefore the
17 Plaintiff relies upon the arguments set forth in the said opposition.

18 Most importantly, the City's motion is based upon an unknown premise, i.e., "What is the
19 Judge's position on Defendant Saavedra's conduct?" At least at one point in time the Judge has
20 asserted that he never intended the Plaintiff to be handcuffed and placed in a cell and that this
21 aspect of the case was done outside the presence of Judge Assad.

22 It is premature to dismiss any action when discovery has not been conducted to determine
23 the factual allegations because the Court is required to accept the Plaintiff's rendition of facts as
24 true.

25 \ \ \

II.

ARGUMENT

In City of Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court ruled that a municipality may be held liable in certain circumstances for constitutional violations caused by its failure to train employees.

Inadequacy of training may serve as a basis for §1983 liability where the failure to train amounts to “deliberate indifference” to the constitutional rights of persons with whom the police may come into contact. In the Canton, Court’s analysis, the issue of the degree of fault is fundamentally related to the policy requirement set forth in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 692 (1978).

The Canton, Court held that liability may be imposed where “in light of the duties assigned to specific officers or employees the need for more training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably” be said to have known of a violation.

The Ninth Circuit has likewise held that in Chew v. Gates, 27 F.3d 1432, 1444 (9th Cir. 1994) that the City may be liable when its policy is the moving force behind the constitutional violation. In this matter, the Plaintiff will demonstrate the City’s policy to allow its Marshals to retaliate against “adversaries” of the department.

In Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992) the Court likewise held that on municipal policy by proving:

1. That the City employee committed a constitutional violation pursuant to a formal governmental policy or a longstanding custom or practice which constitutes the standard operating procedure of the local government entity;
2. That the constitutional tort was committed by an official with final policy-making

- 1 authority and that the action constitutes and act of official governmental policy; or
 2 3. That an official with final policy-making authority ratified a subordinate's
 3 unconstitutional decision or action.

4 In this instance, the City has embraced the marshal's actions as "business as usual."

5 In the case at hand the City would not be arguing judicial immunity if the Judge has told
 6 the marshal to take Ms. Chrzanowski and shoot her. Similarly, assault and battery is not a
 7 protected act. See, Archie v. Lanier, 95 F.3d 438 (6th Cir. 1996) (sexually assaulting a person is
 8 not a judicial act.)

9 Likewise, the Court has held in In re Foust, 310 F.3d 849, 855 (5th Cir. 2002) that law
 10 enforcement officers have absolute immunity for enforcing the terms of a lawful court order, but
 11 only qualified immunity for the manner in which they choose to enforce it. See also, Martin v.
 12 Board of County of Pueblo, 909 F.2d 402, 405 (10th Cir. 1990) (peace officers are not absolutely
 13 immune from liability for the manner in which they carry out otherwise proper court orders.)

14 In the case at hand Ms. Chrzanowski was not disruptive or unruly. She was not a party to
 15 the case. She was taken into custody for the actions of another.

16 MS. CHRZANOWSKI'S STATE LAW CLAIMS ARE VALID

17 1. Defendants Are Not Immune From Liability And The City Is Liable Pursuant To 18 Respondeat Superior For The Marshal's Acts.

19 Officers have no "discretion" to violate the constitutional rights of citizens. See, Owen v.
 20 City of Independence, MO., 445 U.S. 622, 100 S. Ct. 1398 (1980).

21 Nevada Revised Statutes (NRS) 41.032 provides immunity to officers and municipalities
 22 when a suit is:

23 Based upon an act or omission of an officer . . . **exercising due**
 24 **care**, in the execution of statute or regulation, . . . if the statute or
 25 regulation has not been declared invalid by a court of competent
 26

1 jurisdiction; or Based upon exercise or performance or the failure to
2 exercise or perform a discretionary function or duty on the part of
3 the state or any of its . . . political subdivisions or of any officer . . . ,
whether or not the discretion involved is abused.

4 The Nevada Supreme Court has held that NRS 41.032 does not provide discretionary
5 immunity from liability in all cases of personal injury. Williams v. City of North Las Vegas, 91
6 Nev. 622, 541 P.2d 652 (1975). Statutorily provided for governmental immunity does not
7 protect a municipality or officer with regard to their duty to exercise ordinary care in fulfilling
8 those duties. See, Id. Likewise, Defendants had a duty not to violate Ms. Chrzanowski's
9 constitutional rights, yet did so anyway. Therefore, immunity is not afforded to them. Moreover,
10 the statute exempting municipalities and officers from liability for acts of discretion would not
11 exempt the municipality or officer from liability if due care had not been used. See, Harrigan v.
12 City of Reno, 86 Nev. 678, 475 P.2d 94 (1970).

13
14
15 Even if NRS 41.032 provides immunity for actions taken pursuant to an abuse of
16 discretion, it does not provide immunity for actions taken in "bad faith." Falline v. GNLV Corp.,
17 107 Nev. 1004, 823 P.2d 988 (1991), *citing* Crosby v. SAIF, 73 Or. App. 372, 699 P.2d 198
18 (1985).

19
20 In Pittman v. Lower Court Counseling, 110 Nev. 359, 871 P.2d 953 (Nev.
21 1994)(overruled on other grounds), the Nevada Supreme Court reasoned that NRS 41.032
22 provides immunity for officials acting in a discretionary manner. In Travelers Hotel v. City of
23 Reno, 103 Nev. 343, 741 P.2d 1353 (1987), a discretionary act was defined as that "which
24 requires the exercise of personal deliberation, decision and judgment." In contrast, a ministerial
25 act is an act performed by an individual in a prescribed legal manner in accordance with the law,
26 without regard to, or the exercise of, the judgment of the individual. Pittman, 110 Nev. at 364,
27
28

IV.

For the reasons stated herein, Plaintiff respectfully requests this Honorable Court deny the Defendant's Motion to Dismiss.

POTTER LAW OFFICES

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of POTTER LAW OFFICES, and that, on this date, I deposited for mailing at Las Vegas, Nevada, a true copy of PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS addressed to:

PHILIP R. BYRNES, ESQ.
400 E. Stewart Avenue
Ninth Floor
Las Vegas, Nevada 89101

DATED this 20th day of September, 2005.


